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No. 464

In the Supreme Court of the United States

OCTOBER TERM, 1947

FEDERAL TRADE COMMISSION, PETITIONER

v.

MORTON SALT COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

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OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 2114–2127) is reported in 162 F. 2d 949.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 27, 1947 (R. 2127) and a petition for rehearing was denied on September 4, 1947 (R. 2129). The petition for a writ of certiorari was filed on December 2, 1947, and was granted on January 12, 1948. The jurisdiction of this Court is invoked under Section 11 of the Clayton Act, 38 Stat. 734, 15 U. S. C. 21, and

Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

STATUTE INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act of June 19, 1936, 49 Stat. 1526, 15 U. S. C. 13, provides in part:

> (a) It shall be unlawful for any person engaged in commerce * * * either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in

greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: * * *

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

QUESTIONS PRESENTED

1. Whether price differentials which would otherwise constitute unlawful discriminations in price within the meaning of the Robinson-Patman Act must be regarded as non-discriminatory because based upon a general quantity discount

schedule open to all purchasers, but of which only large purchasers are in a position to take advantage.

2. Whether the burden of proving that price differentials which would otherwise violate the Robinson-Patman Act are justified by differences in cost savings rests upon the Commission or the respondent.

3. (a) Whether the Commission made adequate findings that the price differentials in respondent's quantity discount schedules would affect or injure competition.

(b) Whether, assuming adequate findings on this point, there is sufficient evidence in the record to support the findings.

4. Whether the Commission's cease and desist order was too sweeping.

STATEMENT

In this proceeding under Section 11 of the Clayton Act the Federal Trade Commission filed a complaint in September 1940 charging respondent with discriminating in price between different purchasers of products of like grade and quality, in violation of Section 2 (a) of that Act (R. 3, 5). After hearing, the Commission made findings of fact (R. 2069) and entered a cease and desist order (R. 2079). Thereafter, respondent filed in the court below a petition to review this order (R. 2092). Subsequently, pursuant to stipulation, the cause was remanded to the Commis-

sion for modification of the findings and of the order (R. 2109). On April 14, 1945, the Commission filed modified findings of fact and issued a modified order (R. 2081, 2090). Respondent thereupon filed an amended petition for review of the modified order (R. 2099) and the Commission filed a cross-petition for its enforcement (R. 2110).

Except on the question of the effect of the price differences upon competition, the basic facts found by the Commission do not seem to be challenged. The evidence on that question is treated in Point III B, *infra*, pp. 43–71. In order to give the Court an adequate picture of the case, it is sufficient at this point to summarize the Commission's findings.

Respondent, an Illinois corporation, manufactures salt of various kinds and grades which it sells to wholesalers or jobbers, to large retailers such as chain stores, and to concerns using salt in their manufacturing processes, such as meat packers and tanners.[1] The present proceeding relates only to respondent's sales of table salt. Its principal and best brand of such salt, which is known as "Blue Label," is sold consumers in a round blue package containg 26 ounces of salt. Respondent packs 24 packages in a case or carton

[1] Respondent is one of the larger producers and distributors of salt in the United States (R. 7). In 1936 its gross sales were over $5,000,000 and its sales increased year by year until 1940, when they exceeded $8,000,000 (R. 97).

and sells this salt by the case or carton. (R. 2082–3.)

Respondent sells its Blue Label salt to both wholesalers and retailers at a delivered price of $1.50 a case when delivery is made in carload lots and at $1.60 a case when delivery is made in less than carload lots (R. 2083–4).[2] In addition, those who purchase 5,000 cases or more of this salt in any consecutive 12-month period are granted a rebate of 10¢ a case from the carload price, this rebate being remitted by respondent in quarterly, semi-annual, or other stated periods (R. 2084). To any one who purchases in such period 50,000 cases or more, respondent grants a rebate of 15¢ a case from the carload price, but only four customers—American Stores Company, National Tea Company, Safeway Stores, Inc., and Great Atlantic & Pacific Tea Company—have purchased in sufficient quantity to qualify for this rebate (R. 2085). Each of these four concerns operates a chain of retail stores and is granted the rebate upon the basis of the combined purchases of its stores and branches throughout the country (*ibid.*). The rebate in many cases enables these

[2] The carload price applies when various purchasers pool their orders so as to make up a carload shipment and take delivery at the point to which the "pool" car is shipped (R. 285, 356, 362, 389). In ten cities in which respondent maintains a warehouse (R. 28), a customer who picks up Blue Label salt at the warehouse is charged the carload price no matter how small the quantity of salt taken on each pick-up (R. 269–270, 282–3).

chain store organizations to sell Blue Label salt to the public at lower prices than those at which wholesalers can sell this salt to their retail customers (R. 2085–6).

Respondent sells its other brands of table salt at its list price at the producing plant nearest the customer plus the freight rate from such plant to destination. To those who purchase in carload lots respondent grants a "unit discount" amounting to approximately 5 percent of the plant or list price. Respondent also allows an additional one-unit discount to those who during a consecutive 12-month period purchase table salt of the value of $50,000 or more. Although this discount does not apply to Blue Label salt, purchases of this salt are included in determining whether a customer is eligible for this discount. (R. 2086.)

Respondent has also discriminated in price between different purchasers of salt of like grade and quality by means of special allowances or discounts to certain customers. For example, respondent has for several years granted to Consolidated Company, Inc., of Plaquemine, Louisiana, a special allowance of 7½¢ a case from the carload price of $1.50 on its Blue Label salt. Consolidated is a wholesaler operating 22 units or branches throughout the State of Louisiana in competition with other wholesale grocers who do not receive this special discount. Respondent has not shown that these special discounts were

made in good faith to meet an equally low price of a competitor. (R. 2086–7.):

Customers of respondent who received the benefit of the foregoing discounts, rebates, and allowances had a substantial advantage in selling respondent's salt in competition with other customers who paid respondent's full price. Wholesalers who did not receive the benefit of the lower prices were forced either to reduce their possible profits or to suffer the loss of business which resulted from charging prices higher than those charged by respondent's favored customers. In particular, the 15¢ rebate on Blue Label salt given to four large chain stores constitutes a discrimination in price not only against medium-sized chain stores but also against small retailers who have to purchase this salt through wholesalers at prices which prohibit price competition between them and the large retail chain stores (R. 2088–9).

The effect of respondent's price discriminations may be substantially to lessen competition in the line of commerce in which the purchaser receiving the benefit of the discriminatory price is engaged and to injure, destroy, and prevent competition between those purchasers receiving the benefit of respondent's discriminatory prices and those to whom such prices are denied (R. 2089).

The Commission's modified ord (R. 2091) directs respondent to cease and desist, when selling table salt, from discriminating in price among

wholesalers or retailers purchasing products of like grade and quality when the differences in price are not justified by differences in cost resulting from differing methods or quantities in which the products are sold or delivered—

(a) By selling to some wholesalers at prices different from those charged other wholesalers;

(b) By selling to some retailers at prices different from those charged other retailers; and

(c) By selling to any retailer at prices lower than those charged wholesalers whose customers compete with such retailer.

Prohibitions (a) and (b) are limited by the proviso that "this shall not prevent price differences of less than five cents per case which do not tend to lessen, injure, or destroy competition."

The court below (Judge Minton dissenting) set aside the Commission's order on various grounds. The court found that there was no evidence to show that respondent's price differentials were discriminatory or carried a probability of injury to competition, that it was a part of the Commission's affirmative case in showing discrimination to prove that the quantity price differentials were not related to savings in costs, and that the Commission's order was too sweeping and general.

SPECIFICATIONS OF ERRORS TO BE URGED

The court below erred in failing to decide in favor of the Commission the questions enumerated in the Questions Presented.

SUMMARY OF ARGUMENT

I

The language and history of the Robinson-Patman Act show that its purpose was to strengthen the preexisting Clayton Act, by prohibiting price differentials affecting competition which were not warranted by savings in cost. Nothing in the statute or its history suggests any intention to allow the granting of quantity discounts unrelated to cost savings to the large chain store purchasers at whom the statute was, in the main, directed, whenever the seller included the discounts in a general price list so as to make them, in theory, open to all purchasers, but, in practical effect, only to a few large buyers. Such a construction would defeat the purpose of the Act. It appears plainly from the face of the Act that it was not concerned with equality of offers to sell to prospective purchasers, but with the prices in sales actually consummated.

II

The statute contains a proviso that price differentials making only due allowance for differences in cost resulting from the differing quantities sold shall not be unlawful. Under the principle consistently recognized in this Court's decisions, the burden is upon the party claiming to come within a statutory exemption to substantiate his claim. A special section of the Robinson-

Patman Act, providing specifically that the burden of showing justification shall be upon a respondent, makes it plain that this principle was meant to be applicable to the cost justification proviso, *inter alia*. Respondent has not argued to the contrary. The court below nullified the clear congressional intent on this point by reading absence of cost justification into the word "discriminate", and thus making it part of the Commission's affirmative case.

III

A. A mere reading of the Commission's findings (R. 2087–2089) will demonstrate the lack of substance to respondent's contention that there are no adequate findings as to the required injury to competition.

B. These findings are amply supported by the evidence. Under the statute the Commission is required only to show that there may be a "reasonable possibility" of injury to competition, not that injury has actually occurred. *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726, 742. Here there was evidence of the latter, as well as a vast amount of evidence showing the former. Many witnesses testified that salt is a very competitive product, that both the price paid and the price charged by competitors were important factors in determining the resale

price, that if competitors sold at a lower price it would harm their business, and that their business would be adversely affected if competitors were able to obtain their supplies at a lower price. Such a harmful effect would result because a lower cost to a competitor would enable him to resell at a lower price; if he did not do so, he still would be in a position to control the market, and would, in any event, obtain a greater gross profit, which would give him an advantage. These facts, by themselves, establish sufficient possibility of injury to competition. In addition, despite respondent's claim to the contrary, the record contains many examples of instances in which the discounts allowed large purchasers actually harmed the competition of less favored buyers; it does not support respondent's statement that the discounts were never taken into consideration in fixing the resale price.

IV

The Commission's order is properly framed to cope with the violations of the statute found to exist, and is thus entirely valid within the doctrine of *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, and *May Department Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376.

ARGUMENT

I

THE ROBINSON-PATMAN ACT APPLIES TO QUANTITY DISCOUNT SYSTEMS WHICH RESULT IN PRICE DIFFERENCES EVEN THOUGH THE DISCOUNTS ARE OFFERED TO ALL PURCHASERS

Respondent argues that its quantity discount system is open to all purchasers, and that therefore it cannot be regarded as discriminatory even if the discounts cannot be supported or justified by difference in costs.[3] The contention is that the Act applies only to special discounts to favored customers, but not to general discount schedules no matter how great the differentiation in price paid between different groups of competing customers may be.

This would mean that if a company had a list price for a unit of merchandise but in separate contracts with one or a few large chain stores

[3] This argument does not apply to the special discounts given by respondent to purchasers who did not qualify for the regular quantity discounts (R. 2086–7). The court below accepted the Commission's findings (R. 2087) that these discounts were discriminatory and had not been shown to have been made to meet the lower prices of competitors, but held that the Commission had not found and on the evidence could not find injury to competition. The findings and evidence as to effect on competition related to all the discounts, whether general or special. For the reasons set forth in Point III, *infra*, pp. 35–71, we believe the findings and evidence sufficient for the special discounts as well as for the others.

purchasing over 50,000 units allowed a discount of 10%—or 50%—the discount would be unlawful, assuming injury to competitors and the absence of cost justifications; but if the company offered to grant the same discount to all purchasers of over 50,000 units, knowing that only the same large chain stores could possibly buy in such quantities, the discount would be lawful. The hypothetical example given is in fact this case insofar as the $50,000 and fifty thousand and five thousand case discounts are concerned. The record amply demonstrates that no one store or single branch wholesaler could buy those quantities in a year.

The language, purpose and history of the Robinson-Patman Act all join to demonstrate that no such meaningless differentiation was intended. And it should be observed at the outset that, although the point here under discussion was not there considered, the facts of *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726, and *Federal Trade Commission* v. *Staley Co.*, 324 U. S. 746, disclosed on their face a basing point system which made the same offer to all customers who took delivery at the same basing point; the differentiation in those cases was based upon where the customer was located rather than how much he purchased, but there were no special deviations from a general pricing system available to all. The decisions would thus seem to be inconsistent with respondent's contention.

Section 2 of the Clayton Act as originally enacted in 1914 prohibited discriminations in price between different purchasers when potentially harmful to competition. This general prohibition was followed by the proviso

> That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: * * *

As a result of this proviso, Section 2 was construed to permit quantity discounts irrespective of whether the amount of the discount was related to savings in costs resulting from the larger quantity purchased. *Goodyear Tire & Rubber Co.* v. *Federal Trade Commission*, 101 F. 2d 620 (C. C. A. 6), certiorari denied, 308 U. S. 557.

The Clayton Act did not prove to be a successful means of eliminating price discrimination. The House Report (No. 2287, 74th Cong., 2d sess., p. 7), recommending the passage of the Robinson-Patman Act stated that "These provisos have so materially weakened section 2 of that act, which this bill proposes to amend, as to render it inadequate, if not almost a nullity. * * *"

As a result of the expansion of the chain store method of merchandising and the possible harm-

ful effects on small business, the Senate had previously directed the Federal Trade Commission to investigate the chain store system of merchandising and, to report to the Senate, *inter alia*, on—

> (d) how far the rapid increase in the chain-store system of distribution is based upon actual savings in costs of management and operation and how far upon quantity prices available only to chain-store distributors or any class of them; (e) whether or not such quantity prices constitute a violation of either the Federal Trade Commission Act, the Clayton Act, or any other statute and (f) what legislation, if any, should be enacted with reference to such quantity prices. [Senate Resolution 224, 70th Cong., 1st sess., 69 Cong. Rec. 8522 (printed in Sen. Doc. No. 4, 74th Cong., 1st sess., Final Report on the Chain Store Investigation, p. 2)].

The Commission's Final Report (Sen. Doc. No. 4, *supra*), called attention to the inadequacy of the existing law to deal with price discrimination through quantity discounts. See pp. 96–97, 64–65. This report was based on an extensive survey by the Commission, in which 33 preliminary reports had first been submitted. See Sen. Doc. No. 4, *supra*, p. 1. It stated, *inter alia* (p. 53):

> In addition to such buying advantage as the chains obtain by special discounts and allowances, the terms of regular trade and quantity discounts and allowances offered

> may be relatively advantageous to them. Grocery chains apparently have a decided advantage in the matter of such regular trade and quantity discounts and allowances * * *.

Upon the basis of this report and other investigations the House Committee concluded that (H. Rept. No. 2287, 74th Cong., 2d sess., p. 3):

> Your committee is of the opinion that the evidence is overwhelming that price discrimination practices exist to such an extent that the survival of independent merchants, manufacturers, and other businessmen is seriously imperiled and that remedial legislation is necessary.

The Report set forth the purpose of the proposed amendatory legislation, as follows (p. 7):

> The object of the bill briefly stated is to amend section 2 of the Clayton Act so as to suppress more effectually discriminations between customers of the same seller not supported by sound economic differences in their business positions or in the cost of serving them. Such discriminations are sometimes effected directly in prices, including terms of sale; and sometimes by separate allowances to favored customers for purported services or other considerations which are unjustly discriminatory in their result against other customers. * * *

The Committee Report also stated (p. 3):

> To accomplish its purpose, the bill amends and strengthens the Clayton Act

by prohibiting discriminations in price between purchasers where such discriminations cannot be shown to be justified by differences in the cost of manufacture, sale, or delivery resulting from different methods or quantities in which such commodities are to such purchasers sold and delivered. * * *

With respect to the proviso permitting differentials justified by costs, the Report declared (p. 9):

> This proviso is of great importance, for while it leaves trade and industry free from any restriction or impediment to the adoption and use of more economic processes of manufacture, methods of sale, and modes of delivery, wheresoever they may be employed in streams of production or distribution; it also limits the use of quantity price differentials to the sphere of actual cost differences. Otherwise, such differentials would become instruments of favor and privilege and weapons of competitive oppression.

The Senate Report (No. 1502, 74th Cong., 2d Sess.) states, along the same lines, that the due allowance proviso "is of greatest importance", that it "strictly limits the use of quantity price differences" to the sphere of actual cost savings, and that "It marks the zone within which differentials may be granted" (p. 5). It states (p. 4):

> The weakness of present section 2 lies principally in the fact that: (1) It places

> no limit upon differentials permissible on account of differences in quantity; and (2) it permits discriminations to meet competition * * *. While the bill as now reported closes these dangerous loopholes, it leaves the fields of competition free and open to the most efficient, and thus in fact protects them more securely against inundations of mere power and size.

And in explaining the Conference Report to the House just before final passage of the bill, Representative Utterback, who was in charge of the bill, stated (80 Cong. Rec. 9417):

> But the bill does not permit price differentials merely because the quantities purchased are different, or merely because the methods of selling or delivery are different, or merely because the seasons of the year in which they enable production are different. There must be a difference in cost shown as between the customers involved in the discrimination, and that difference must be one "resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." * * *
>
> * * * The differential granted a particular customer must be traceable to some difference between him and other particular customers, either in the quantities purchased by them or in the methods by which they are purchased or their delivery taken.

It is apparent from this brief review of the background from which the statute evolved that

Congress intended to prevent all price differentials based on quantity (and affecting competition) if not warranted by savings in cost (or permitted by other provisions of the statute not pertinent here). At no point did the legislative committees suggest or intimate that a differential unjustified by cost savings would be lawful if embodied in a general discount system which would be open to all who could qualify, although Congress was obviously not unaware of the patent fact that the large chain stores could obtain an advantage over their smaller competitors by means of a general quantity system allowing discounts to all purchasers of very large quantities of merchandise. To have excluded such transactions from the requirement that quantity discounts be related to costs savings would to a great extent have defeated the purpose of the statute.

The language of the statute, even apart from the compelling force of its history and purpose, clearly leads to the same conclusion. The pertinent provisions are the general prohibition making it unlawful "for any person * * * to discriminate in price between different purchasers of commodities of like grade and quality", and the first two provisos, which read as follows:

> *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in

which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: * * *

Respondent's argument rests on the word "discriminate" in the general prohibition. Although "discriminate" has several connotations, running from differential treatment to adverse and unjust distinction,[4] in this setting it clearly encompasses differentials based upon general as well as special quantity discounts and otherwise unjustified, as long as there is a competitive relationship between the parties. As Mr. Utterback, Chairman of the

[4] Webster's International Dictionary (2d Ed.):
Discriminate—"To make a difference in treatment or favor."
Discrimination—"A distinction, as in treatment; especially an unfair or injurious distinction."
Funk & Wagnall's New Standard Dictionary (1937):
"To make a distinction; deal unequally."
Murray's New Oxford English Dictionary (1897):
"To make an adverse distinction with regard to; to distinguish unfavorably from others."

House subcommittee which considered the bill, and Chairman of the Conference Managers for the House, stated, in explaining the conference bill (80 Cong. Rec. 9416):

> In its meaning as simple English, a discrimination is more than a mere difference. Underlying the meaning of the word is the idea that some relationship exists between the parties to the discrimination which entitles them to equal treatment, whereby the difference granted to one casts some burden or disadvantage upon the other. If the two are competing in the resale of the goods concerned, that relationship exists. * * * But where no such relationship exists, where the goods are sold in different markets and the conditions affecting those markets set different price levels for them, the sale to different customers at those different prices would not constitute a discrimination within the meaning of this bill.

See also 80 Cong. Rec. 8229, 8230, 8232–8233.

Secondly, the cost proviso, which the framers of the Act regarded as basic, permits only those quantity discounts, which make "due allowance for differences in the cost * * * resulting from the differing methods or quantities * * * sold". This clause contains no exception for general discount systems unrelated to cost savings, and would not accomplish its obvious purpose if such a wide class of unjustified discounts were exempted.

Thirdly, the second proviso, in the words of the House Committee Report (No. 2287, p. 10):

> permits the Federal Trade Commission to fix, as to particular commodities, quantity limits beyond which quantity price differentials shall not be permitted, even when supported by cost differences of the character authorized earlier in the paragraph. This proviso rests upon the principle that where even an admitted economy is of a character that is possible only to a very few units of overshadowing size in a particular trade or industry, it may become in their hands an instrument that lessens competition and that tends to create a monopoly; and that in forbidding its use and foregoing its benefits the public is merely insuring its freedom from monopoly control.

This proviso shows that the only statutory exception to the cost allowance clause was a restriction upon the allowance of quantity discounts even when justified by cost savings, not an expansion of the right to grant discounts without regard to costs. Furthermore, the proviso was meant to deal with the situation in which a quantity discount, even justified by cost savings, might be available only to a few units of great size; the advantage possessed by such units over similar units would be just as great if the discounts were generally available to all purchasers of such magnitude. The very evil the proviso was designed to reach would be not within the Commission's

power if the statute was inoperative as to such discounts.

Respondent's argument in substance is that it does not discriminate if it offers to sell to everybody on the same terms, that is, in accordance with the same discount schedule, and if the discounts are thus available to everyone. But Section 2 (a) is not in terms concerned with offers to sell but with the prices at which sales are actually made. The section speaks of "purchasers" of commodities; of "purchases", and of "commodities * * * sold for use, consumption, or resale." Likewise, in the first or "due allowance" proviso, reference is made to the differing methods or quantities in which commodities "are to such purchaser sold or delivered." As the Circuit Court of Appeals for the Third Circuit stated in *Shaw's, Inc.* v. *Wilson-Jones Co.*, 105 F. 2d 331, 333:

> The discrimination in price referred to must be practiced "between different purchasers". Therefore at least two purchases must have taken place. The term purchaser means simply one who purchases, a buyer, a vendee. It does not mean one who seeks to purchase, a person who goes into the market-place for the purpose of purchasing. In other words, it does not mean a prospective purchaser, or one who wishes to purchase, as the appellant contends.

See also *Sorrentino* v. *Glen-Gery Shale Brick Corp.*, 46 F. Supp. 709 (E. D. Pa.). The equal opportunity to purchase at identical prices thus does not comply with the statute if the prices actually paid are different and unjustified.

In addition it is clear that the equal opportunity to purchase large quantities is largely fictitious. That is not only true generally, but was clearly the situation demonstrated by the record in the instant case. The evidence shows that the vast majority of respondent's customers were small concerns whose yearly purchases were limited to no more than a few hundred cases of salt (R. 198, 404, 416, 704, 782, 788, 811, 1055, 1064, 1082–83, 1105, 1116 1231; Resp. Ex. 6; see pp. 45–46, *infra*). Such purchasers do not possess the financial resources, storage facilities or the customers to enable them to purchase 50,000 cases or $50,000 worth of salt. Only five nationally known concerns—American Stores, Great Atlantic & Pacific Tea Company, National Tea Company, Kroger, and Safeway Stores—have been able to take advantage of the opportunity to secure the 15 cents per case discount for 50,000 cases of Blue Label salt (Comm. Ex. 41, R. 125), and only seven other companies have qualified for the unit discount in addition to the carload discount for $50,000 purchasers (*ibid*). Considering the thousands of wholesale and retail dealers in the United States, the 100 customers who received

the 10 cents per case discount for 5,000 cases is very limited (Comm. Ex. 42 A–D, R. 134).[5] An offer couched in terms which only a few can accept is clearly not as a practical matter equally available to all purchasers—and the Robinson-Patman Act was intended to deal with a practical problem.

It should be noted that where the discount is in fact and practice available to all customers, it would presumably not be unlawful. The Commission might find that no competitor would in fact suffer injury if the discount applied to a quantity small enough for him to purchase without difficulty, for if injury would result he could avoid it by obtaining the discount himself. The Commission so held in a case involving discounts for small quantities of eye-glass lenses and frames within the reach of any retailer. In *Matter of American Optical Co.*, 28 F. T. C. 169 (1939), the Commission stated (p. 183):

> We do not find, upon these facts, that the "column" differentials have the effect of substantially lessening or injuring competition, either with respondents or with their customers. A different conclusion might be reached if it should appear that these differentials were extended to large quantities beyond the range of the purchases of the average retailer, thereby resulting in discrimination in favor of certain

[5] In the area covered by this record, the number was 49, out of over 4,000 customers, or 1¼%. See Resp. Ex. 6.

> large dealers—but such is not shown to be the case here.

Thus the hypothetical case presented by respondent of two cigars selling for 25 cents instead of 15 cents each would not be affected by the statute.

In concluding this point we wish to note that to give the Act the effect which it must have if it is to achieve its purpose would not outlaw all quantity discounts. In addition to the situation just described, differentiation between non-competitors, such as concerns selling in different markets, would not in circumstances such as the present, be affected (see p. 22, *supra*). And, as the House Committee Report declared (H. Rep. No. 2287, 74th Cong., 2d sess., p. 17):

> There is nothing in [the Act] to penalize, shackle, or discourage efficiency, or to reward inefficiency. * * *
>
> Any physical economies that are to be found in mass buying and distribution, whether by corporate chain, voluntary chain, mail-order house, department store, or by the cooperative grouping of producers, wholesalers, retailers, or distributors—and whether those economies are from more orderly processes of manufacture, or from the elimination of unnecessary salesmen, unnecessary travel expense, unnecessary warehousing, unnecessary truck or other forms of delivery, or other such causes—none of them are in the remotest degree disturbed by this bill. * * *

The Committee fittingly concluded that (*ibid.*):

> It is not believed that the restoration of equality of opportunity in business will increase prices to consumers. Unfair trade practices and monopolistic methods which in the end destroy competition, restrain trade, and create monopoly have never in all history resulted in benefit to the public interest. On the contrary, for the most part, they have been symbolic of lower wages, longer hours, lower prices paid producers, coercion of independent manufacturers, domination of that field of industry, and in the end high prices to consumers and large profits to the owners.

II

THE STATUTE IMPOSES THE BURDEN OF SHOWING COST JUSTIFICATION FOR THE QUANTITY DISCOUNT SYSTEM UPON THE RESPONDENT

Throughout this proceeding it has been assumed by the parties that the burden of showing a cost justification within the meaning of the proviso in Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, was on the respondent. Respondent's counsel so stated on two occasions during the hearing before the Examiner (R. 75, 1492), and he has not argued to the contrary either in his brief below or in his brief in opposition to certiorari. Nor has respondent contended that he has adequately carried this burden, although some evidence on cost was submitted by respondent and considered by the Commission (R.

2089, 1484, *et seq.*, 1573, *et seq.* 1695–1718). Indeed respondent asserts (Brief in Opposition, p. 4) that no issue as to cost justification had been raised, and that the court below "could not and did not decide anything about the question of where the burden of proving cost savings lies." Nevertheless, we think that the court below did hold that the burden of showing cost justification in the case rested on the Commission (R. 2119, 2123). Since that question is of great importance to the administration of the statute, it is necessary to deal with it despite respondent's apparent—but in our opinion very reasonable—unwillingness to support the decision below on that ground.

Section 2 (a) of the Act makes it unlawful to discriminate in price between different purchasers of commodities of like grade and quality where the effect of the discrimination may be substantially to restrain or injure competition. Following this general prohibition is a proviso:

> That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *

This proviso is an exception or exemption from the general prohibition (*United States* v. *Cook*, 17 Wall. 168), and was so regarded by Congress.

H. Rep. No. 2287, pp. 8–9; S. Rep. No. 1502, p. 3, 74th Cong., 2d sess.; 80 Cong. Rec. 9417. Under a long established and repeatedly enunciated principle the burden was upon the respondent to establish that its quantity discount system came within this exception. *United States* v. *Cook*, *supra*; *Ryan* v. *Carter*, 93 U. S. 78, 83; *Schlemmer* v. *Buffalo, Rochester, &c. Ry.*, 205 U. S. 1, 10; *Javierre* v. *Central Altagracia*, 217 U. S. 502, 507–508; *McKelvey* v. *United States*, 260 U. S. 353, 356–357.

This clearly was the understanding of Congress. Thus the Senate Report (*supra*, p. 3) states:

> Section 2 (a) attacks directly the problem of discrimination in prices and terms of sale. Like the present Section 2 of the Clayton Act it contains a general prohibition against such discriminations, from which certain specific exceptions are then carved, *thus throwing upon any who claim the benefit of those exceptions the burden of showing that their case falls within them.* [Italics supplied.]

See also 80 Cong. Rec. 4078, 80 Cong. Rec. 3599; Crowley, *Equal Price Treatment under the Robinson-Patman Act*, 95 U. of Penn. L. Rev. 306, 340.

Section 2 (b) removes any vestige of doubt that the burden is upon the respondent. It provides:

> Upon proof being made, at any hearing on a complaint under this section, that

> there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: * * *

The purpose of this provision was merely to make certain that the rule as to burden of proof which would prevail in the courts would also prevail in the administrative proceeding before the Commission. Thus Representative Utterback, the Chairman of the Conference Managers for the House, stated (80 Cong. Rec. 9418):

> Owing to a body of court decisions to the effect that the legal rules of evidence do not in certain respects apply to hearings before administrative commissions, and to the uncertainty thus suggested, the bill contains a subsection stating the rule as to burden of proof, substantially as suggested above, as applicable to hearings before the Federal Trade Commission.

See also 80 Cong. Rec. 8241; Note (1936) 50 Harv. L. Rev. 106, 116-117.

In *Moss* v. *Federal Trade Commission*, 148 F. 2d 378, certiorari denied, 326 U. S. 734, the Circuit Court of Appeals for the Second Circuit affirmed an order of the Commission which, *inter alia*, had found no evidence of cost justification;

although the opinion does not deal with the precise question here, its conclusion that, once sales at different prices were shown, the burden of proof as to other factors shifted to the respondent, would clearly also have applied to the burden of proving cost justification.[6]

As the statement in the Senate Report quoted above indicates, Section 2 of the Clayton Act prior to its amendment was in its scheme similar to the present Section 2 (a). It contained a general prohibition against price discriminations followed by a proviso relating *inter alia* to quantity discounts.[7] In the two cases under this section touching upon the question now raised, the court, relying in part upon the cases cited *supra*, p. 30, stated that the burden was upon the discriminator to establish facts bringing it within the proviso. *American Can Co.* v. *Ladoga Can-*

[6] The *Moss* case is discussed, *infra*, pp. 36, 40.

[7] Sec. 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: * * *"

ning Co., 44 F. 2d 763, 768 (C. C. A. 7), certiorari denied, 282 U. S. 899; *Gibson Canning Co.* v. *American Can Co.*, 1 F. Supp. 242 (E. D. Ill.).

We submit that the considerations which have lead this Court to shift to the person who claims the benefit of an exception the burden of proof that he comes within such exception are peculiarly weighty here. The respondent alone has possession of all the written evidence as to his costs and can more easily and expeditiously produce it. To impose upon the Commission the burden of negativing the exception would, as a practical matter, in large part emasculate the prohibitions of the Act.

The court below did not in terms state that the burden of negativing the cost justification exception rested on the Commission. But it reached the same result by defining the discrimination which the Commission must prove as a part of its affirmative case to include an absence of cost justification.* Such an interpretation of "dis-

* The opinion stated in this connection (R. 2123):

"Moreover, we are not prepared to say that the relationship of quantity price differentials to due cost allowances is an affirmative defense of justification to discrimination contemplated by Section 2 (b), for the reason that the defense contemplated by that section is not a defense to any price discrimination, however harmless, but to the wrongful price discrimination forbidden by Section 2 (a). The defense of justification is the defense to a violation either admitted or established.

"In the absence of evidence and finding that a particular price derived from a quantity discount is discriminatory, and

criminate" would nullify both the general rule as to burden of proof and the proviso confirming its application to this statute. This result would be contrary to the obvious congressional intention, disclosed on the face of the statute read as a whole and in the legislative history referred to above.

The court below apparently differentiated between situations in which the spread between units granted different quantity discounts was large and the discount "a relatively small part of the selling price", and in which the brackets were small and the discounts disproportionately large. (R. 2123). In the former situation, the court concluded that "no presumption should arise that such differentials do not correspond with the due cost allowances of the vendor in the manufacture, sale and delivery of his product", while "this result might not apply" in the latter. *Ibid.* But the provision in the statute imposing the burden of rebutting the prima facie case upon the respondent does not apply only where the differentials on their face seem disproportionate to overall costs; the burden is placed upon the respondent in all cases. To make the shifting of the burden dependent on whether some authority, here the

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carries the probability of injury to competition, etc., and, *in the case of quantity price differentials, that same were not related to reasonable cost allowances, there would be no wrongful discrimination*, and the defense of justification would not be in order." [Italics supplied.]

reviewing court, found a discount on its face reasonable or unreasonable from the viewpoint of costs would not only result in great uncertainty as to ultimate decision, but would make it impossible for trial counsel on either side of the proceeding to know what to do at the time when the evidence was being introduced—which is the time when the burden must be sustained. And the burden of showing affirmative justification obviously was not meant to be sustained merely by proof of the quantity brackets upon which discounts were based and the amount of the price differentiation, since this would still leave almost entirely to subjective conjecture the question whether the differential in fact resulted from differences in costs. The intention of Congress was clearly to impose the burden in all cases upon the party who has primary access to the cost information, that is, the respondent.

III

THE COMMISSION MADE PROPER FINDINGS, ADEQUATELY SUPPORTED BY EVIDENCE, AS TO THE EFFECT OF RESPONDENT'S DISCOUNT SYSTEM UPON COMPETITION

The statute only prohibits discrimination in price "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, *or to injure, destroy, or prevent competition with any person who either grants or knowingly re-*

ceives the benefit of such discrimination, or with customers of either of them." The italicized clause was added by the Robinson-Patman Act.

The Commission has assumed in this case, and generally, that proof of the harmful effect on competition required by the clause quoted above, as distinct from the matters referred to in the subsequent provisos, was a part of its affirmative case. Since there was no dispute in the instant case as to the fact that respondent sold different quantities of salt at different prices, the major portion of the 1300 printed pages of testimony introduced by the Commission as a part of its affirmative case was concerned with the question of effect on competition. In *Moss* v. *Federal Trade Commission*, 148 F. 2d 378, certiorari denied, 326 U. S. 734, the Circuit Court of Appeals for the Second Circuit held, however, that once the Commission has shown that a respondent has charged two prices, the burden is on the respondent to prove that competition may not be affected.[9]

[9] The Court stated in the *Moss* case (148 F. 2d at 379):

"It is true that § 2 (a) makes price discrimination unlawful only in case it lessens, or tends to prevent, competition with the merchant who engages in the practice; and that no doubt means that the lower price must prevent, or tend to prevent, competitors from taking business away from the merchant which they might have got, had the merchant not lowered his price below what he was charging elsewhere. But that is often hard to prove; the accuser must show that there were competitors whom the higher of the two prices would, or might, not have defeated, but who could not meet the lower. Hence Congress adopted the common device in such cases of

Respondent's present contentions are that the Commission has not made the findings required by the statute as to the necessary effect on competition, and that if the findings be regarded as adequate in that respect they are unsupported by substantial evidence. We shall show that each of these contentions is unsound. In addition, a preliminary analysis of the problem may be helpful.

As we have seen, the statute requires that discrimination is unlawful if the effect "*may be* substantially to lessen competition * * * or to injure * * * competition with * * * customers" of the person who grants the discrimination. This means that there must be a probable or reasonably possible, not a mere remote, effect on competition—but not a certain or proved effect. *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726, 738, 742. And the Commission may draw reasonable inferences of fact, such as a reasonable man would draw, from facts which are proved or conceded. *Id.* at 742; *Federal Trade Commission* v. *Raladam Co.*, 316 U. S. 149, 152.

It may be assumed that the Commission has to introduce sufficient evidence to support a finding

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shifting the burden of proof to anyone who sets two prices, and who probably knows why he has done so, and what has been the result. If he can prove that the lower price did not prevent or tend to prevent anyone from taking away the business; he will succeed, for the accuser will not then have brought him within the statute at all. * * *"

of probable injury to competition in order to prove a violation of the law. But such a finding would be adequately supported, we submit, by evidence (1) that a company sells at different prices, (2) to customers who are in competition with each other, plus a factual inference by the Commission, based on these two facts, that the competition of the purchasers who must pay the higher price will probably be injured. Although there may be circumstances in which this might not necessarily be true, as when all purchasers in fact and in practice can purchase at the lower price without difficulty (see p. 26, *supra*), the normal inference which a reasonable man would draw from sales to competitors at different prices is that the purchaser paying the higher price would suffer a competitive disadvantage. For the Commission to draw such a reasonable inference would hardly be arbitrary or unreasonable. The Commission need not be ignorant of what everyone else knows. In a similar situation under the Federal Trade Commission Act this Court held that the Commission could "infer that trade will be diverted" from ethical competitors upon a showing of conduct which might be expected to produce that result, in that case the making of misleading representations as to a product with which other products were in competition. *Federal Trade Commission* v. *Raladam Co.*, 316 U. S. 149, 152. The Court there stated that "it is not

necessary that the evidence show specifically * * * losses to any particular trade or traders." *Ibid.* See also *Corn Products Co.* v. *Federal Trade Commission,* 324 U. S. 726, 742.

By analogy we submit that it is not necessary in cases under the Robinson-Patman Act for the Commission in the first instance to do more than prove a difference in price to competitors. In order to furnish support for the inference as to effect on competition which a reasonable man familiar with the way in which competitive enterprise operates would draw from those facts alone, the Commission should not be compelled to adduce hundreds and even thousands of pages of testimony in order to elicit examples and details and expert opinions to the effect that the person who pays the lower price obtains a competitive advantage. In the instant case, for example, the Commission's evidence, most of which related to this issue, covers over 1,300 pages in the printed record (over 2,300 pages of the typewritten transcript). The entire hearing, including respondent's evidence (R. 1298–2069), covered the better part of 12 weeks and necessitated two circuits of a substantial portion of the United States, running from Chicago to New Orleans, Florida, the Carolinas, and finally Washington. Such an extended proceeding should not be necessary to prove the obvious. Enforcement of the statute will be hampered if the Commission's resources

must be dissipated in such unnecesary efforts just as much as by restrictive interpretation of the law itself.

This does not mean that a respondent would be foreclosed from proving that in his particular case the sales to competitors at different prices would not affect competition. For example, the discounts might be too insubstantial in amount to have any effect; thus in this case the Commission did not prohibit discounts smaller than 5¢ per case. But in view of the ordinary effect of such discrimination as between competitors, a respondent should have to submit very convincing proof in order to warrant a court in holding that a Commission inference of injury to competitors was not a reasonable one.[10]

A. *The Commission's findings of probable injury to competition amply support the Commission's order*

There is no basis for respondent's contention that the Commission did not make proper findings as to injury to competition.

The Commission made the ultimate finding that the effect of respondent's price discriminations

[10] The view advanced above differs from that adopted by the Second Circuit in the *Moss* case in one respect. Proof of price difference *and of competition* would be necessary to shift the burden of proof to the respondent to show lack of effect on competition; the *Moss* case required merely proof of the former. But the existence of competition can ordinarily be easily proved; indeed, it would seldom be denied.

"may be substantially to lessen competition in the line of commerce in which the purchaser receiving the benefit of said discriminatory price is engaged and to injure, destroy, and prevent competition between those purchasers receiving the benefit of said discriminatory prices * * * and those to whom they are denied" (R. 2089). This finding is supported by numerous other more specific findings (R. 2085–6, 2087–9).

Thus, the Commission found that the respondent's wholesale and retail "customers * * * who receive the benefit of the various discriminatory prices * * * granted by the respondent have a substantial advantage in selling respondent's salt in competition with other customers of the respondent who do not receive the benefit of such discriminatory prices" (R. 2088). It further found that salt "is generally sold by wholesalers to their retail customers on a lower margin of profit than * * * other commodities. Consequently, the price at which the wholesaler offers his table salt is usually controlling, and a difference of 5 cents per case may result in the loss of a sale to a customer, not only of the salt involved but of other commodities as well, the order for which might be placed with the salt purchase" (R. 2087). "In some instances the discounts allowed by the respondent to some of its wholesaler customers have enabled such wholesalers to offer respondent's table salt to retail dealers at prices equal to prices

paid by competing wholesalers or at prices less than competing wholesalers could reasonably sell said salt to the retailer customers" (R. 2087–2088). The rebate given by respondent to four large retail chains "in many cases permitted such retail chain groceries to sell respondent's Blue Label salt to the consuming public at prices less than those at which wholesalers could reasonably sell said salt to their retail customers" (R. 2085–2086). "In order to sell respondent's table salt in competition with customers of the respondent who receive the benefit of respondent's discriminations in price, wholesalers who pay respondent's full price or who are denied the discounts or rebates allowed such favored customers must either sell at competitive prices and in so doing reduce their possible profits by the amount of the discriminations against them, or attempt to sell at higher prices than those which the favored customers of respondent charge for the same product, with the result of inability to secure business and a reduction in the volume of their sales" (R. 2088). The Commission also found that "respondent, by selling its Blue Label salt to such large retail chain stores at prices below those charged for the same salt when sold to wholesalers, forces retailer customers of such wholesalers to pay prices which prohibit competition in price between such small retailers and the large retail chain stores" (R. 2088–2089).

Respondent challenges the adequacy of these findings on the ground that "they are utterly lacking in either specific reference or general allusion to any evidence of where, when, how, to what extent, with what frequency or intensity, or even to whom these alleged injurious events took place" (Br. in Opp., pp. 6–7). But the findings are not required to recite the evidence on which they are based. Except for the ultimate finding in the words of the statute, the findings are purely factual. Respondents have cited, and we believe that they can cite, no decisions of this Court indicating that such findings are inadequate. To the contrary see *Meeker & Co.* v. *Lehigh Valley R. R. Co.*, 236 U. S. 412, 427–428; *Georgia Public Service Comm.* v. *United States*, 283 U. S. 765, 773; *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, 538–539.

B. *The findings of the Commission that the effect of respondent's discount system may be to affect competition adversely are supported by substantial evidence*

Respondent does not challenge the Commission's findings relating to the price differentials at which it sells its salt. These findings show that respondent sells its Blue Label salt to wholesalers and retailers at $1.60 per case in less than carload lots, at $1.50 per case in carload lots, at $1.40 per case to those who annually purchase 5,000 or more cases, and at $1.35 per case to those

who annually purchase 50,000 cases or more. Respondent sells its table salt other than Blue Label to wholesalers and retailers at 5% off of list price to those who purchase in carload lots and at approximately 10% off of list price to those who annually purchase $50,000 or more worth of salt, including Blue Label salt. (R. 2083–2086.)

Respondent contends that there is no substantial evidence in support of the Commission's finding that the effect of these price differentials in sales to competing purchasers may be to affect competition adversely. Its argument on the evidence, however, is almost exclusively devoted to showing that there was no evidence that the price differentials actually have had such an effect on competition. This is not the test. Actual injury to competition need not be shown if the evidence warrants inference of injury. *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726, 742. In that case the only evidence bearing upon the effects upon competition of certain discounts granted to favored purchasers of gluten feed, meal, starch and starch products was the stipulated fact that the discounts were sufficient, "*if and when*" reflected in whole or in substantial part in resale prices, to affect competitors adversely. In other words, injury to competition was only contingently shown by the evidentiary facts. This Court nevertheless held that the evidence warranted a finding of the effect

upon competition condemned by the statute. It said (p. 742):

> * * * But it is asserted that there is no evidence that the allowances ever were reflected in the purchasers' resale prices. This argument loses sight of the statutory command. As we have said, the statute does not require that the discriminations must in fact have harmed competition, but only that there is a *reasonable possibility* that they *"may"* have such an effect. * * * [Italics supplied.]

We shall show not only that the evidence demonstrates that there is a reasonable possibility that the discounts may have harmed competition, but that in a number of instances they have actually done so. The fact that respondent's witnesses testified to other circumstances in which competition may not have been injured would not refute the evidence supporting the Commission's position, or establish a lack of evidence to support the Commission's finding.

A number of basic facts can hardly be disputed. Respondent's president admitted that there was competition between those of respondent's customers who did and those who did not receive the quantity discounts (R. 106). Respondent's exhibit 6 (not printed) shows that in the portion of the United States billed out of respondent's headquarters in Chicago there were 3,643 customers who bought less than 500 cases of

Blue Label salt during the year 1941, 343 who bought between 500 and 4,999 cases, and 49 who qualified for the 10¢ discount by purchasing between 5,000 and 50,000 cases. Only the A. & P. Safeway, National Tea, American, and Kroger chains were granted the 15¢ discount.[11] Only six customers in addition to the five big chains received the additional discount on other table salt for $50,000 purchases (Exhibit 41).

Respondent's general sales manager testified that "salt is a very competitive product" (R. 1279). The testimony of other witnesses proves conclusively that this was true in the resale of respondent's salt. Witnesses in large numbers testified that the cost of salt purchased by a wholesaler or retailer was an important factor, though, of course, not the only one, in establishing the resale price. (R. 495–498, 541, 560, 587, 596, 681, 699, 732, 783, 811, 835, 1044, 1056, 1129, 1150–1151, 1848–1849, 1894, 1949–1952, 1974, 1996.) In addition, many witnesses testified that the prices charged by a competitor were also an important factor. (R. 681, 699, 732, 783, 790, 835, 970, 1056, 1128–1129, 1151, 1269, 1834–1838, 1931, 1952.) A number of witnesses testified that if a competitor sold at a lower price they would have either to meet the price or lose business.

[11] The Commission did not make any finding that Kroger was given the 15¢ discount, but this was conceded by respondent (R. 1331). Exhibit 41 shows that in some years Kroger purchased over 50,000 cases.

(R. 970, 1128, 1175–1176, 1188–1189, 1198–1199, 1232, 1239, 1269, 1276.) Indeed, the ordinary method of determining selling price was to take the cost of a commodity, add to it the desired mark-up to cover all additional expenses and profit, and, where thought necessary, reduce the price which would otherwise have been charged in order to meet competition (R. 1820, 1858–1859, 1891, 1899).

A great many witnesses also testified that if a competitor was selling salt at a slightly lower price it would affect their business adversely. Wholesalers: R. 208, 261, 277, 334, 390, 403, 426, 459, 482, 494, 506–509, 529–530, 567, 701, 705–706, 783, 791, 811, 860, 877, 907, 970, 998, 1044, 1056, 1150, 1233, 1262, 1732, 1769. Retailers: R. 219, 251, 383, 517, 600, 644, 649, 717, 719, 732, 754–755, 805, 835–836. Although many made no such qualification, some indicated that a difference of less than 5¢ in respondent's price would not be harmful (R. 277, 587, 970).[12] One witness testified that "I think that anybody that undersold us 2-cents would get most of the business" (R. 791). Another witness stated that if one of his competitors sold Blue Label salt at 5¢ a case less he would either have to "meet [their price] or lose the business" (R. 907). Another witness testified that "we have to be competitive," by which he

[12] This is the basis for the provision in the Commission's order which does not forbid differentials less than 5¢ (R. 2091).

meant "meeting competition on salt"; "you have to do that to get the business, because people will not pay us a greater profit than they will pay our competitor, or rather, a greater price than they will pay our competitors". He agreed that "if you didn't meet competition * * * you would lose salt business" (R. 998). A retailer stated that if the A & P sold salt for half a cent a package less "unless we met that price, naturally we will lose some business" (R. 717). Another retailer stated that "it is absolutely necessary that we be competitive on all items, particularly anything as important as salt", and that if a competitor were selling the Blue Label package at a price one cent less "it would naturally hurt our salt business, and probably some of the other business, but we wouldn't allow anyone to undersell us on an item as important as Morton's salt, regardless of cost". He "would meet the competition" "for the simple reason that if you don't meet competition and keep your prices in line, you will soon be out of business. We can't afford to have people undersell us in the same type of business we operate." (R. 732.)

There was also testimony, elicited by respondent, to the effect that because salt was only one small item out of several thousand carried by grocery wholesalers and retailers, a dealer would not suffer if he were out of line on salt prices if his prices were in line generally (R. 448, 540,

578–579, 1790, 1852–1853, 1870, 1880). It is, of course, true that this is one factor which a dealer may take into consideration. Nevertheless, many witnesses testified that a small difference in the price of salt would affect competition. Thus one of respondent's witnesses stated (R. 1729–1730):

> Well, on our regular customers, customers who have been dealing with us over a period of years, I don't think it would do any harm, but we also have a group of customers who do a lot of shopping, and when I say shopping, that is going around looking for bargains, and you might be given an order, let us say, for ten items, and Morton Salt comes up, and you are asked a price on it, and you quote a price of a dollar sixty-five. Well, the customer says, "I can get it from one of these other wholesalers at a dollar fifty-nine. Will you meet it?" We say no, that we will not meet it, and the chances are we will lose that order just on account of that one item. Now, that happens just in a very few cases with the shoppers, as I say, but with our regular customers, who really give us the majority of their business, or our business, it doesn't make any difference. You might get fussed at *at* [sic] little bit, or called down, but that is about all.

Other witnesses stated that if they were out of line on such a staple item as Morton's Blue Label salt, customers would tend to think them

out of line generally. Examples of such testimony are the following:

> We have lots of customers that shop around on prices. They don't give us all the business automatically. If somebody undersells us on a staple item like Morton's salt, they would probably give the other man the business. (R. 791.)
>
> Of course, my salt business would be affected, but all of my other business would suffer, also. (R. 927.)
>
> * * * * *
>
> Well, I might say that the generally accepted rule in the wholesale grocery business is this: If you are out of line on one particular item, why, it hurts all of your business, because it puts this doubt in the merchant's mind: "Well, if he is out of line on this, maybe he is out of line on something else," and all of your business is affected. (R. 927–928.)

Another witness stated that he would meet a competitor's price because

> Well, if you are out of line on too many items, you lose business all the way around. You lose not only business, but you lose prestige with the trade. The trade likes to stay with the winner, they don't like to stay with a loser. (R. 970.)

Another witness testified:

> Well, we would not only lose that salt business, but we would probably lose some other business along with it.

Q. You mean, by not being in line on one particular commodity, that it might affect the general order you are receiving from that customer?

A. Yes, it would.

Q. How does that come about, sir?

A. Well, our customers take it for granted that, we would be higher on other commodities if we were higher on one commodity than our competitors. (R. 1056.)

Another witness said:

Q. Why do you meet that competition?

A. Well, we meet competition for, I will say, the psychological effect. If we are out of line on a few items, it is natural to suppose that the customer would think that ultimately we were out of line on a good many other things; perhaps everything. (R. 1065.)

There was thus ample evidence, in support of the Commission's findings, to show that a dealer charging a higher price for his salt would lose business, despite respondent's evidence that salt comprised only a small proportion of the total grocery business. Moreover, since the same could be said of almost any single item of the thousands carried by a grocery dealer, acceptance of respondent's position, that the relative unimportance of a single item carried negatives the existence of injury to competition in that item, would render the statute completely inoperative as to the very grocery store

situation which its history (*supra*, pp. 16–17) shows Congress intended to correct.[13]

Almost every witness was asked whether the prices paid for salt by his competitors would affect his business, and in particular whether his business would be affected—harmfully, of course—if a competitor could purchase from respondent at a price five, ten, or fifteen cents lower than the price available to him. The opinions of the witnesses[14] on this question took in the main two forms. Many witnesses stated that if a competitor paid a lower price his business would be adversely affected. (R. 340, 404, 423, 426–427, 506, 513, 519–520, 529, 583, 588, 603, 613, 644, 706, 732,

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[13] See *Matter of H. C. Brill Co.*, 26 F. T. C. 666, 680, in which the Federal Trade Commission stated:

"* * * Of course a price differential of 2¼ percent on a single product of no greater importance than ice cream powder is not sufficient to give The Great Atlantic & Pacific Tea Company any appreciable competitive advantage in all of its business, but it does receive a definite advantage in the sale of that particular commodity. The competitive advantage becomes the greater when a company doing a Nation-wide business is permitted to obtain a 2¼ percent differential from a considerable number of sellers. Even though individually they are of relatively little importance, the sum of the differentials would undoubtedly give the buyer a decided competitive advantage."

[14] There is no basis whatsoever for the statement in the opinion below that "many" of these witnesses "were not shown to possess any qualifications for the opinion given" (R. 2121). Every witness was actively engaged in the grocery business and had been so engaged for a substantial period of time. Each was thus amply qualified to answer questions as to the fundamental workings of the business.

784, 812–813, 836–837, 875–876, 907, 914, 970, 1067, 1084–1085, 1170, 1199, 1262.)[15] Many others declared that their business would be affected if

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[15] For example:

The WITNESS. Would our business be affected if the trade bought all of their salt at a lower price?

By Mr. HASLETT:

Q. Yes.

A. Yes, as far as our salt business is concerned, we wouldn't sell any. (R. 583.)

* * * * * *

Q. The price that you pay for your various products is a very important factor in your business, isn't it, sir?

A. That is the only thing that matters in our business, is the price, what we pay for it.

Q. Then, there would be a definite injury to your business by the fact that one of your competitors was paying $1.40 a case for salt, while at the same time you were paying $1.50?

A. I don't think there is any question about that. (R. 613.)

* * * * * *

Q. And what effect would it have on your business if one of your competitors purchased Morton's salt at $1.40 a case, while at the same time you were paying $1.50 a case? * * *

The WITNESS. Well, he would be in a position to undersell us. He could either undersell us, or he could make more profit for himself. (R. 706.)

* * * * * *

Q. And what effect would it have on your business if one of your competitors was purchasing Morton's salt at $1.40, while at the same time you were purchasing it at $1.50? * * *

The WITNESS. Well, it would affect me to the extent that if I didn't meet the competition, I wouldn't make the sale, that is all. I couldn't sell it and make a profit. (R. 783–84).

* * * * * *

Q. And what effect would it have on your business if C. D.

the competitor took advantage of the discount to sell at a lower price. (R. 341, 420, 482, 509, 540, 579–580, 595–596, 685, 755, 806, 863, 1045, 1150,

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Kenny was purchasing that salt at $1.40 a case, while at the same time you were paying $1.50 for it, sir? * * *

The WITNESS. Well, my opinion is it would create a tendency for Kenny to get most of the Morton salt business there. (R. 794–795.)

* * * * *

* * * to the extent that if there were too wide a differential, it would be very hard for us to meet a competitor's price if it were lower. However, if we did have to meet that price, as I stated a few minutes ago, it would just reduce our profits. (R. 836–837.)

* * * * *

* * * I couldn't stay in business if all the other of my competitors had a 5-cent better price than I had, I could not operate.

By Mr. HASLETT:

Q. What effect would it have upon your business if one of your competitors was purchasing salt at $1.35 a case, while at the same time you were paying $1.42 a case for the same type of commodity? * * *

The WITNESS. I couldn't meet competition. In other words, if all of the commodities were sold on that basis, I couldn't operate. (R. 875–876.)

* * * * *

Q. Why is it that your company purchases Morton's round package blue label free running and iodized salt through the Dixie Home Stores instead of being billed directly by the Morton Salt Company?

A. To secure a better price, and an advantage, so that we might be more competitive. (R. 904–905.)

* * * * *

Q. What effect would it have on your business if some of your competitors were paying 80-cents a case for the Kleer table salt, while at the same time you were paying 85-cents a case for it? * * *

1188, 1224, 1233, 1276–1277, 1769, 1874.)[16] Indeed, respondent's sales manager testified that if one of respondent's competitors offered a customer a

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The WITNESS: That would stop the sale of that salt for us. * * *

A. Well, that salt is sold on a very close margin. Five cents would ruin the sale. The difference in price would almost kill the sale of a package of Kleer salt. * * * (R. 1084–1085.)

Q. What effect would it have on your business if one of your competitors was purchasing Morton's salt at ten cents a case less than the price you were paying for it, sir? * * *

A. Why naturally there is a depressive effect if it is a general thing, or lasted all along.

Q. But do you think he would be in a favorable position?

A. Ultimately it would be very detrimental. I don't imagine I could stand it too long if it was a general practice.

Q. It would have an adverse effect upon your business?

A. Oh, yes. (R. 1067.)

[16] For example:

Q. What effect would it have upon your business if one of your competitors in your retail end of your business who sells salt in competition with your members direct to the consuming public, was purchasing Morton's round package blue label salt at $1.45 a case, while at the same time your company was purchasing it at $1.50 a case? * * *

The WITNESS. Well, naturally, if they passed on the price to the consumer, it would almost prohibit us from selling at that much differential. Salt is a very close item, but if the price to the consumer was held up along with what the independents sell for, it would not affect us in that case, but if it was lower, and we had to sell higher, why, then it would affect us. (R. 863.)

* * * * *

Q. If one of your competitors was purchasing the Morton's round package salt at $1.35 a case while at the same time

lower price "more often than not it is reflected in their resale price" (R. 1328). There obviously is a "reasonable possibility" that respondent's customers may react in the same way to a reduction in respondent's price.

But even if the competitor did not in fact lower his prices because of the discount, many witnesses thought they would still be injured because their competitors would be in a position to undersell them when they wished and would thus have a whip-hand over the market (R. 341, 420, 717, 836–837, 1056, 1241, 1245, 1251, 1270),"[17]

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you were paying $1.42 a case for it, sir, would that, in any way, affect your business? * * *

The WITNESS. Well, if he was to take advantage of his better price to reduce his own selling cost, I mean his selling price, yes, if I sold any salt I would have to meet his price and it would possibly be below my operating cost. (R. 1276–1277.)

[17] For example:

"Q. Then, it wouldn't make any difference, so far as your business is concerned, whether that competitor who was also selling for $1.65, paid $1.40 or $1.45 or $1.48 a case, would it?

A. But it would make a difference, because he can undersell me." (R. 341.)

In answer to similar questions other witnesses stated that the competitor "is in a position to cut that price." (R. 420.)

"Well, if they were paying $1.40 and we were paying $1.50, naturally they could undersell us. (R. 717.)

* * * * *

Well, he would be in a position to sell at a lower price than we could. (R. 1056.)

* * * * * *

Well, I think it would put them in a position to undersell us if they so desired, and if they didn't undersell us, I don't

and also because the additional gross profits which a competitor receiving discounts would reap if he did not reduce his price would give the competitor a general business advantage which he could use in lowering the prices of other commodities. (R. 343, 506, 604, 610, 644, 1084, 1189, 1199, 1853, 2066).[18]

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know whether we could survive on a less profit than they were getting or not.

By Mr. HASLETT:

Q. The threat of underselling would always be there?

A. Yes. (R. 1241.)

* * * * * * * * * * * I would say that your competitor that was purchasing it for 5 cents a case less than we were, he would have the whip over us. (R. 1245.)

* * * * * * * * * * * Well, he would have a chance to reduce his selling price if he wanted to." (R. 1270.)

[18] In answer to the question as to the effect of competitors being forced to pay different prices, witnesses testified that—

"I believe where one merchant owns merchandise cheaper than the other merchant, he has the advantage of his competitor * * *.

Q. And the fact that the competitor is making a greater profit on the sale of his commodity would have a very determining effect upon your business, wouldn't it, sir?

A. Yes, very much. (R. 343.)

* * * * * * * * * * * It would give him a decided advantage. He would have a longer margin of profit, which he could use to sell merchandise for less money than we could. (R. 506.)

* * * * * * * * * * * * the only thing I have got to offer is the price, and if we have got to pay 15-cents more a package than anybody else, naturally we can't sell the product as freely as we

The excerpts in the testimony quoted in the footnotes on the preceding pages indicate that there is adequate evidence to show that a difference in the price charged by respondent may reasonably be expected to affect competition between respondent's customers, and to harm competition of the smaller customers who cannot qualify for the discounts. As we have stated, the Commission is not required by the statute to show more than a "reasonable possibility" that the discrimination "may" have a harmful effect. *Corn Products Co.* v. *Federal Trade Commission*, 324 U. S. at 742, *supra*, pp. 44–45. We think that the evidence briefly summarized sustains the Commission's finding that (R. 2088):

> The Commission further finds that customers of the respondent who receive the

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could if we could buy them at the same price the competitor was buying them.

I want to clarify that answer. It is not a question whereby the competitor is using the 15-cent rebate. He may not use it in the salt business at all, because he may want to protect his manufacturer in order not to demoralize the price of salt, but he is liable to take the 15-cents and use it for a different item altogether. He may sell milk for less money, because the 15-cents makes it possible for him to do it. (R. 604.)

* * * * * * *

* * * He could take the 10-cents and apply it to milk.

Q. Has that ever happened?

A. Yes, that is the general principle straight through the grocery business. That is part of the reason why the smaller merchants couldn't stand up against the chain stores, because they used exactly this kind of money in different commodities, and naturally made it impossible for the small merchants to compete with them." (R. 610.)

benefit of the various discriminatory prices, discounts, rebates, and allowances granted by the respondent have a substantial advantage in selling respondent's salt in competition with other customers of the respondent who do not receive the benefit of such discriminatory prices; discounts, rebates, and allowances or who are obliged to pay respondent's full price for said salt. In order to sell respondent's table salt in competition with customers of the respondent who receive the benefit of respondent's discrimination in price, wholesalers who pay respondent's full price or who are denied the discounts or rebates allowed such favored customers must either sell at competitive prices and in so doing reduce their possible profits by the amount of the discriminations against them, or attempt to sell at higher prices than those which the favored customers of respondent charge for the same product, with the result of inability to secure business and a reduction in the volume of their sales.

Respondent argues, however, that there was no proof that any competitors had actually been injured by its price differentials because it claims the discounts were not taken into account in fixing resale prices. Even if this were so, it would not mean that the Commission had not established a case of reasonable possibility of injury. But in any event, the record contains numerous examples of the effect of the discounts upon actual prices, as the following illustrations will show.

(1) Respondent's president stated from his own knowledge that "generally" the differential in price is reflected in the retail price by the retailers to the consumers (R. 55).

(2) A wholesaler in New Orleans stated that he was forced to reduce his price to $1.55 per case because of a customer who wanted to "meet the chain competition, claiming that he had to resell that salt for 7-cents a package, which would figure $1.68" (R. 182–183). He knew that the A & P was selling salt at 7¢ a package, or $1.68 a case, which was lower than the wholesale price of $1.70 at which he sold to some customers (R. 183).

(3) Another New Orleans wholesaler testified that his regular price was $1.65 but that he occasionally sold at $1.60 because he has "a customer who would be in close competition with the" A & P who needed a price "inducement" (R. 192–193).

(4) A Tampa wholesaler who was not entitled to a discount testified that he had to sell salt for which he paid $1.50 at $1.58 because two competitors, one of whom was allowed a discount (R. 441), sold at that price. "We either had to meet that price or lose the salt business, and a nice grocery business at the same time" (R. 417).

(5) A Miami wholesaler who originally paid $1.50 for salt but subsequently became entitled to the discount testified that his business "was affected" before he obtained the discount, "but

now that we do get that 10 cents per case quantity allowance, there is no one affected by it" because he purchased at the same price as his competitors (R. 494). He testified that at times he cut the prices as low as $1.48 a case in order to sell the 5,000 cases which he had agreed to take in order to get the discount. This price was not "under our cost" because of the discount (R. 497–498).

(6) A Jacksonville wholesaler and retailer testified that he sold salt purchased at $1.50 a case for $1.55 "really less than we would like to sell it for", because of competitors selling at $1.55 (R. 613). Among the competitors is Thomas & Howard Co., which obtains a discount (R. 614–615).

(7) A Macon wholesaler testified (R. 684–685):

> With reference to a specific case, there is one retailer in Macon who phoned me for a price on Morton's salt. Knowing that he was a close buyer, I named him a price of 5-cents a case over our cost, rather than the usual 8-cents, and we lost the business because he said that he could purchase Morton's salt for $1.50. * * * I was rather surprised. He named the company from whom he could buy it, and I was rather surprised, because usually this house did not sell goods at cost.
>
> Q. And who was that competitor that he named, sir?
>
> A. C. D. Kenny Company.

The Kenny Company is allowed a discount of 10¢.

(8) A Macon retailer who was not allowed a discount testified that he had to check prices with other retail chains to see that he was not being undersold (R. 719). Among the chains were A & P and Colonial, both of which are granted discounts (R. 726–727).

(9) An Atlanta wholesaler testified that "we can't meet the Quality Service Stores price of $1.53 on Morton salt, when it is costing us $1.50" (R. 755). The Quality Service Stores is a member of the NROG stores, which obtain a 10¢ discount (R. 746–747).

(10) Another Atlanta wholesaler testified that he lost salt business to Kenny Co. or to companies which met Kenny's prices (R. 817–818). Kenny Co. is allowed a 10¢ discount.

(11) An Asheville, N. C., wholesaler who originally paid $1.50, but was now paying $1.42 by purchasing through another wholesaler who was allowed a discount (R. 870–871), testified that he had "lost some business" to customers obtaining lower prices:

> * * * In other words, when I was paying $1.50 for salt, it was impossible for me to meet $1.60. That would be too small a margin to haul salt on.
>
> Q. What do you mean by "it would be too small a margin"?
>
> A. A dime a case is too small to haul salt from cars and unload it in the warehouse and send it out and deliver it maybe 40 or 50 miles, and also charge it and carry

the account. The mark-up is too small to handle it on a dime a case profit.

Q. Now, when you sell it at $1.60, you are making 18-cents a case, is that right?

A. That is right, 18-cents. (R. 873.)

He further testified that when he quoted a price of $1.65 to a Charlotte grocery store he was asked "can't you meet competition" at $1.60, and that he couldn't until he got the $1.42 price (R. 884).

(12) A Greenwood, S. C., wholesaler testified that originally he paid $1.50 for respondent's salt but that he subsequently obtained it for $1.40 through another wholesaler. When asked why he changed his method of payment, he replied (R. 919):

> Well, Thomas & Howard was about to eat me up on it, and naturally it was affecting my other business. If I went into a merchant and asked him $1.70 for Morton's round package salt, and Thomas & Howard came along and offered it for $1.60, why that merchant, he would say, "What have you got, Roddey, that you can sell in competition with these other gentlemen? Have you got anything that is reasonable?" and it affected my other business, not only the business that I had lost on the Morton round package, but I don't mind saying that the competition with the round package before I had this hurt my other business bad.
>
> Q. I see, so your other business was affected by the fact that you couldn't com-

pete when you weren't getting the 10-cent lower price?

A. That is correct.

The same witness further testified:

> * * * I distinctly remember, not on one occasion, but on two occasions, where Mr. Britt, the broker, told me that the Morton Salt Company was not giving discounts to Thomas & Howard any more. Now, on the strength of that statement, I bought Morton's salt— * * * (R. 922) to wake up about 60 days later to find that Thomas & Howard were selling it to the retail trade at what I was paying for it from the Morton Salt Company. (R. 923.)
>
> * * * * * *
>
> * * * I have lost business because I have not been able to compete on salt and other items that certain competitors, mainly Thomas & Howard, have been able to purchase cheaper than I have been able to purchase them. (R. 954.)

The same witness stated that Thomas & Howard had on occasion offered salt to his customers at $1.50 a case, which was the price he was paying (R. 956).

(13) A Columbia, S. C., wholesaler testified that his salesmen had reported that Thomas & Howard was offering lower prices (R. 1060–1061).

(14) Another Columbia, S. C., wholesaler testified that the main wholesaler selling below $1.65 was Thomas & Howard, stating that his salesmen had been so informed by H. L. Green Co. (R.

1071–1072). He was sure he "lost a good bit of" business to Thomas & Howard (R. 1075). He was informed that Thomas & Howard had quoted Green a price of $1.50 as a result of which he lost Green's salt business (R. 1076). This testimony was corroborated by the manager of a retail store for the Green Co., who stated that he had been paying Thomas & Howard $1.50 a case for several years (R. 1095–1096). He had told some of the salesmen how much he paid Thomas & Howard (R. 1097). Another wholesaler also testified that Thomas & Howard was selling at a price of $1.60 (R. 1088), which was less than the general price of $1.65.

(15) A customer wrote to a subsidiary of respondent a letter complaining that his company and Kenny Co. received salt in the same cars but that "he gets his salt at the special price" and that "Kenny is selling this salt to the trade here at 90-cents to 92-cents per case, so you see that it would be impossible to sell salt at any profit at all unless we were on the same basis with him" (R. 1092). The respondent replied that although the sale to the customer was "no more expensive than the sale to Kenny" respondent could not legally allow to the customer the same discount granted Kenny because Kenny was a large purchaser (R. 1093).

(16) Another Columbia, S. C., wholesaler testified that he had lost salt business to Thomas &

Howard and Kenny on account of their lower prices (R. 1106–1109).

(17) A Charlotte, N. C., wholesaler testified that prior to the time he received the 10¢ discount from respondent there were salt prices which he could not compete with (R. 1149).

(18) A Durham, N. C., wholesaler testified that he purchases for himself and other wholesalers in order to get the 10¢ discount, and that the purpose of this arrangement was "in order to be on a competitive basis with the large buyers" (R. 1219). Thomas & Howard and Kenny had offered to sell his customers at $1.55 a case; sometimes he met the price and sometimes he passed the business up (R. 1222–1223). His price was $1.60.

(19) A Winston-Salem wholesaler buying at $1.50 without a discount was getting $1.75 while salt was being sold at $1.65, so he arranged to buy through another wholesaler at $1.40 or $1.42. He did this to meet competition, particularly of Kenny and Thomas & Howard, who were selling for 5 to 10¢ less than he was (R. 1237–1239).

(20) Another Winston-Salem wholesaler testified, to substantially the same effect, that he arranged to get the discount "to make us competitive with these people like Kenny and Thomas & Howard that qualify for the $1.40 price". He would have to be on the same basis with his competitors if he "was to keep operating wholesale". (R. 1275.)

Respondent argues that the testimony is uncontradicted that no discount customer took the discount into account in fixing its resale price. Nine witnesses called by respondent did so testify on behalf of nine companies getting the 10¢ discount (R. 1738, 1759–1760, 1822–1823, 1852–1853, 1866–1868, 1955, 2004, 2024, 2039). Witnesses for the A & P, however, admitted that their price was based on $1.40 rather than $1.50 (R. 1889, 1909).[19] In addition, a Kenny witness testified that although the retail price was based on $1.50 without taking into account the 10¢ discount, the discount was taken into consideration in determining the salesmen's commission (which was based on the company's gross profit) so as to give them greater compensation and increase their interest in the item (R. 2055–2056).

It is noteworthy, however, that respondent did not call all the discount purchasers who had previously testified as Commission witnesses, including some whose testimony had clearly indicated that they did take the discounts into effect in fixing their prices. Thus witness Applebaum testified that "since we got into this agreement to sell 5,000 cases a year, we have at times cut the price as low as $1.48 or $1.49 a case to push the sale

[19] Two A & P witnesses said that their retail price would be the same irrespective of whether the purchase price was $1.40 or $1.55 (R. 1895, 1902). A third A & P witness was not sure whether the difference between $1.35 (the price actually paid by A & P) and $1.50 would or would not make a difference in the retail price (R. 1932–1933).

of Morton salt when we became overstocked" (R. 497)—a price not "under our cost" because of the 10% discount, and at which he clearly would not have resold if he had been paying $1.50 instead of $1.40. Witness Groves stated that he could not lower his $1.65 price to meet competitors selling at $1.60 while he "was paying $1.50", but only since he managed to purchase at a discount (R. 884). Witness Roddey similarly stated that he could not compete with Thomas & Howard's $1.60 price until he arranged to get the discount (R. 919, 932), and that he had been "selling a whole lot more of the round package since I have been receiving this 10-cents a case than I was before I received it" (R. 944). The fact that he has been able to sell at $1.60 to meet competition since he obtained the discount means, of course, that he took the discount into effect in determining his resale price. The testimony of other witnesses that they had to get the discount "to make us competitive" (R. 1275) with people who qualified for the discount obviously means the same thing (R. 969, 1144–1145, 1219, 1275).[20]

We agree, of course, with respondent that many factors enter into the determination of resale

[20] None of these witnesses purchased the 5,000 cases necessary for the discount; in each instance they arranged to buy through another wholesaler who would sell to them at $1.40 or $1.42 in order to aggregate his order and thus obtain the discount for himself (R. 844, 878, 919, 969, 1144–1145, 1217–1219, 1273–1275).

price, and that it is often difficult if not impossible to isolate the effect of each. Since it is apparently customary for dealers, whether obtaining discounts or not, to reduce the price at which they would prefer to sell in order to be "competitive", it is difficult to tell from the actual prices charged whether the discount customer is charging a lower price in order to be "competitive" in the sense of getting new business, or a non-discount customer is charging a lower price in order to be "competitive" in the sense of not losing business—or vice versa. Nevertheless, it would seem obvious that a 10¢ or 15¢ difference in the price paid a manufacturer on a commodity normally marked up not more than 25¢ would give the purchaser obtaining the discount a substantial advantage over his smaller rivals. And the illustrations we have cited, at perhaps too great length to prove the obvious, show that this has in fact been the case often enough to infer that generally, if not always, there is a strong possibility that it would be so—despite the sometimes credible and sometimes incredible (R. 1746, 1970–1971) testimony to the contrary of respondent's witnesses from the companies who benefited by the discount system.

One fact, however, does seem to be established by the prices themselves. The A & P and other chain retailers sell at some of their Super Markets at 7¢ a package (R. 214, 296, 726, 770, 804, 1783, 1924). This amounts to $1.68 for a case of 24

packages. The record on the whole indicates that perhaps the most prevalent wholesale price is $1.65, and that non-discount wholesalers paying $1.50 only with difficulty can cut to $1.60 to meet competition. Obviously a wholesaler cannot sell at $1.65—or possibly even at $1.60—to a retailer who must sell at $1.68 retail price in order to be competitive, and who must have some margin to cover his own overhead costs. Since some wholesalers often sold at $1.70 or more (R. 182–183, 275, 390, 415, 426, 449, 458, 705, 1055, 1065), it is clear that many retailers are paying a wholesale price greater than their chain competitors are charging at retail. There was unquestionably substantial basis for inferring that these differences are in large part attributable to the discounts allowed to the retail chains.

Respondent introduced tabulations which show that respondent's sales to non-discount customers increased substantially during the period in question. But these increases may have resulted from any number of causes, such as, in one instance, the merger of two companies (R. 277–278). This appears on the face of the tabulations (attached to respondent's brief below), which show, for example, that the Blue Label purchases in 1941 of discount wholesalers who testified for the Commission were 57% in New Orleans and 449% in the remainder of Louisiana of the purchases in 1937; as to the other table salts, purchases in 1941 were 6% of 1937 for discount retailers in New

Orleans, 681% in Georgia and Florida, 113% in the Carolinas, 61% for non-discount retailers in Georgia and Florida, and 201% in the Carolinas. Such discrepancies prove that a great many factors must have affected the quantity of respondent's salt purchased, and show the unreliability of the figures in the tabulation as proof of the lack of effect of respondent's discount system. These general statistics hardly require the Commission to disregard the other evidence in the record relating to the precise problem.

We think it clear from the above review of the record that there was ample evidence to support the Commission's findings. Indeed, even if proof of actual injury to competition, and not a mere possibility of injury were essential, the record would be adequate. Since there is evidence of actual injury, the record is indeed stronger than in the *Corn Products* case. See pp. 37, 44–45, *supra*.

It is axiomatic that in cases such as this it is for the Commission to weigh the evidence and to draw factual inferences therefrom, and that the reviewing court must accept the Commission's conclusions if there is any rational basis in the evidence for them. The majority of the court below, though professing to observe these principles, appears to have accepted uncritically the analysis of the evidence in the briefs submitted by respondent, and to have disregarded the ample evidence supporting the Commission's decision.

As this Court said in *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73:

> The Court of Appeals, though professing adherence to this mandate, honored it, we think, with lip service only. * * * In fact what the court did was to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences. Statute and decision * * * forbid that exercise of power.

IV

THE COMMISSION'S ORDER IS NOT TOO SWEEPING IN SCOPE AND SHOULD BE AFFIRMED WITHOUT MODIFICATION

The court below interpreted the Commission's order as prohibiting any kind of violation of the statute rather than merely the particular violations found by the Commission, and concluded that the order was too sweeping in its scope under the tests applied in *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, and *Milk and Ice Cream Can Institute* v. *Federal Trade Commission*, 152 F. 2d 478 (C. C. A. 7) (R. 2125).

We note as a preliminary matter that under the very decisions upon which the court below relied the proper corrective action where an administrative order otherwise valid has an unwarranted reach is, not to set aside the order, as was here done, but to modify it in such a way as will appropriately restrict its application. See *Ex-*

press Publishing case, at p. 439; *Milk and Ice Cream Can* case, at pp. 483–484.

The general rule is that the Federal Trade Commission, like comparable administrative agencies, "has wide discretion in its choice of a remedy deemed adequate to cope with" the unlawful conduct which it has found, and that judicial review "extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy." *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U. S. 608, 611–612. This rule, of course, has as much application where the question is the scope or breadth of relief which will be effective, as where it involves the character of the prohibition required for this end.

The starting point in determining whether the order in the present case is unduly comprehensive must be the violations of the statute which furnish the foundation for the order. The Commission's findings disclose that respondent's unlawful price discrimination took a variety of forms. In its sales of Blue Label salt, respondent illegally discriminated in price between carload purchasers and less-than-carload purchasers, between those who did and those who did not purchase 5,000 cases in a twelve-month period, and between those who did and those who did not purchase 50,000 cases in such period. As to other kinds of table salt, respondent discriminated in price between carload and less-than-carload purchasers

and between those who did and those who did not purchase from respondent in a twelve-month period salt costing $50,000 or more. In addition, respondent illegally discriminated in price by granting special allowances to certain favored customers.

An order prohibiting solely the particular price discriminations which respondent has hitherto granted would obviously be almost completely nugatory. Such an order would leave respondent free to give discounts based upon quantity purchases differing in amount from the quantities previously used in determining eligibility for discounts; i. e., it might allow a discount of more or less than 10¢ a case when total purchases in a twelve-month period exceed 2,500 cases or 3,500 cases, and it might grant a larger discount when purchases within such period exceed 40,000 cases, or 45,000, or any other chosen figure. Likewise any prohibition against special allowances to particular favored customers would have little meaning or effect unless phrased in terms of a general, forthright prohibition of all price discriminations of this type.

The Commission would clearly have been justified in prohibiting respondent from discriminating in price in the manner set forth in paragraph five, in paragraph six, and in paragraph seven of its findings of fact, "or in any manner or degree substantially similar thereto." This was the form of the order affirmed in *Corn Products Refining*

Co. v. *Federal Trade Commission*, 324 U. S. 726.[21] What is here significant is that the effect of an order so framed would be to bar any variation in price in sales to competing retailers or to competing wholesalers. And in view of the findings of paragraph five, such an order also would undoubtedly bar sale to any retailer at a lower price than that charged by respondent to a wholesaler whose customers competed with such retailer. Such an order, in other words, would be just as "sweeping" as the present one.

The order which the Commission entered is not, as the court below seemed to think, a blanket injunction to respondent not to do any act of any kind violative of Section 2 (a) of the statute. Respondent makes and sells all kinds of salt but the order is confined to sales of table salt. It is further confined to sales where the purchasers are in competitive relationship in one of three specified ways, i. e., retailers in competition with each other, wholesalers in competition with each other, and retailers competing with the customers of a wholesaler purchasing from respondent. There are also other significant limitations on the scope of the order. The order does not apply to price differences which are justified by cost differences resulting from the differing methods and quantities in which the product is sold or delivered (R. 2091). The order also permits,

[21] Record in *Corn Products* case, No. 680, 1944 Term, pp. 489–490.

in sales made to competing retailers or to competing wholesalers, price differences of less than 5¢ a case "which do not tend to lessen, injure, or destroy competition" among such respective competitors (*ibid.*).

Upon the record in this case, it is clear that any variations between the prices charged by respondent to different purchasers of its table salt are essentially of the same character whatever may be their differences in form. The Commission's order therefore properly undertook to bar, in general terms, the charging of different prices to purchasers competitive with one another. The situation here is totally unlike the one discussed in the *Express Publishing* case, where this Court said (312 U. S. at 435–436) that the mere fact that a defendant has been found to have committed an act in violation of a statute does not justify entering an injunction broadly enjoining him from committing "some new violation unlike and unrelated" or "disassociated from" that which he had previously committed. That case, moreover, strongly supports the order now under consideration. The Court there noted (pp. 437–439) that its prior decisions had upheld administrative orders having the generality held to be objectionable in the case before it, where the facts of record disclosed "persistent attempts by varying methods" to violate the statute "in circumstances from which the Board or the court found or could have found the threat of continuing and

varying efforts to attain the same end in the future." This doctrine has recently been expressly reaffirmed. *May Department Stores Co.* v. *National Labor Relations Board,* 326 U. S. 376, 386–392. The Court there said (pp. 391–392):

> * * * Injunctions in broad terms are granted even in acts of the widest content, when the court deems them essential to accomplish the purposes of the act. We think that the Board has the same power to determine the needed scope of cease and desist orders under the National Labor Relations Act that courts have, when authorized to issue injunctions, in other litigation.

CONCLUSION

For the above reasons it is respectfully submitted that the judgment of the court below should be reversed and the Commission's order affirmed.

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